IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LARRY GOLDBERG, as Trustee of the JAY GOLBERG SEPARATE PROPERTY TRUST and Personal Representative of the ESTATE OF JAY GOLDBERG, Appellant, v. BRUCE A. WOLF, as Special Administrator for the ESTATE OF HAROLD A. PRESZLER, deceased, Respondent.	No. 34167-1-II UNPUBLISHED OPINION

BRIDGEWATER, J. — Jay Goldberg's estate (Jay's estate) appeals from a summary judgment that found that the statute of limitations barred its suit against the estate of his former accountant, Harold Preszler, and that Jay's estate suffered no damages from Preszler's allegedly negligent advice. We hold that because Jay wrongfully converted community property, his estate was never entitled to those community property assets and suffered no damage when it repaid Jay's wife for her share of the community property. Thus, we affirm the summary judgment.

FACTS[1]

Jay Goldberg was married to Patricia Goldberg for 54 years until his death in 1997. On May 18, 1998, Patricia sued her husband's estate, alleging that he had unlawfully diverted community assets into a separate property account. In an unpublished decision, we held that Jay Goldberg improperly deprived the marital community of one-half of its ownership interest in the Goldberg Furniture Company (GFC) as well as improperly diverting profits from GFC. Because the trial court had awarded only lost profits, we remanded the case for valuation of the misappropriated ownership interest.

On remand, the trial court awarded Patricia $1,003,260.25 as the amount wrongfully diverted from her half of the community property. On May 18, 2004, Patricia and Jay's estate entered into a settlement agreement in which Jay's estate agreed to pay the whole amount in exchange for Patricia dropping her appeal from that judgment.

On March 27, 2000, before Patricia's lawsuit reached settlement, Jay's estate sued Harold Preszler's estate. Preszler was Jay's and GFC's accountant from 1967 to 1979, Jay's estate and tax planner from 1965-87, trustee for Jay's children from 1966-73, and Jay's assistant in reorganizing GFC from 1965-70. The complaint alleged that Preszler's accounting negligence caused Patricia's lawsuit. The parties agreed to toll the lawsuit pending our decision in *In re Estate of Goldberg*.

The parties agree that our recitation of the substantive facts *In re Estate of Goldberg* controls. According to our opinion, in the 1960s, Jay Goldberg's separate property included a 50

[1] Many of the facts of the case are taken from *In re Estate of Goldberg*, noted at 111 Wn. App. 1015, 2002 Wash. App. LEXIS 735, at *2, 4-5, 5-6, 7, 8, 18.

percent interest in GFC. Jay and Patricia held the other 50 percent interest as community property. In 1966 and 1968, in order to realize tax savings, Jay sold his entire separate interest to his children, Larry and Diane. After these sales, the children held 50 percent of GFC, and Jay and Patricia's community held the other 50 percent.

In 1970, Preszler, who was acting as Diane's trustee, Jay, and Larry decided to reallocate the partnership profits. They decided to continue allocating the children 50 percent of the profits, but they reduced the community share to 25 percent. The remaining 25 percent began going to Jay's separate property account. This arrangement—Jay receiving 25 percent as separate property and the community receiving 25 percent—continued until 1995.

The final conversion took place in 1995, when Larry purchased Jay's 25 percent supposed separate ownership interest and the 25 percent community ownership interest in GFC. Jay's wrongful conversion of marital assets thus took place in two phases. First, in 1970, Jay began diverting half of the community's profit from GFC to himself. This continued from 1970 to 1995. Second, in 1995, Jay wrongfully converted half of GFC's ownership interest when he placed half of the proceeds from selling the community's interest in GFC into his separate property account.

After Patricia's lawsuit settled, Preszler's estate moved for summary judgment, arguing that the statute of limitations barred Jay's estate's claim against him. Preszler's estate also argued that Jay's estate suffered no damage because it merely repaid Patricia for money Jay wrongfully converted. In addition, Preszler's estate raised several equitable estoppel arguments seeking to bind Jay's estate to positions it had taken in the lawsuit against Patricia.

In response, Jay's estate submitted Patricia's declaration, signed in 2005, indicating that

had Preszler or her husband asked her to consent to the community property transfer in 1970, she would have done so. Jay's estate argued that had Preszler properly advised Jay that he needed his wife's consent, she would have consented, the transfer would have been accomplished, and Jay's estate would have owned the assets it wrongfully diverted from the community.

The trial court granted summary judgment on the statute of limitations and lack of damages issues, but it expressly declined to rule on the estoppel arguments.

ANALYSIS

We review summary judgment motions de novo, engaging in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The moving party is entitled to summary judgment if it meets the burden of demonstrating that there is no genuine issue of material fact. CR 56(c); *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We consider all facts in the light most favorable to the nonmoving party. *Vallandingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). And summary judgment is appropriate only if, in view of all the evidence, reasonable persons could reach only one conclusion. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

We note that on de novo review, we are not bound by the trial court's lack of findings. Indeed, findings of fact are inappropriate on summary judgment. *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991). We engage in the same inquiry as the trial court on the same record. If "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," fail to show a genuine issue as to any material fact, moving party is

entitled to a judgment as a matter of law. CR 56(c); *Vallandingham*, 154 Wn.2d at 26. We therefore examine the record to determine, on our own authority, whether there is a genuine issue of material fact.

Although Jay's estate first appeals the trial court's ruling on the statute of limitations, we do not reach that question because we hold that Jay's estate suffered no damages when ordered to return wrongfully converted community assets.

I. Damages

Jay's estate argues that the trial court erred in determining that, as a matter of law, Preszler's alleged negligence caused no damage to the estate. Relying on *Omicron Co., Inc, v. U.S. Fid. & Guar. Co.*, 21 Wn.2d 703, 152 P.2d 716 (1944) (*Omicron I*), and *Omicron Co., Inc. v. Cent. Sur. & Ins. Corp.*, 23 Wn.2d 135, 160 P.2d 629 (1945) (*Omicron II*), the trial court ruled that because Jay's estate only returned money wrongfully converted from Patricia, it suffered no legally compensable damages. We agree.

In *Omicron*, a bonded real estate broker gave Omicron a $1,000 check from his principal. *Omicron I*, 21 Wn.2d at 704. The principal claimed that the agent acted without authority and demanded the check back, but Omicron refused. *Omicron I*, 21 Wn.2d at 704. In a subsequent lawsuit, the principal prevailed, and the court entered a judgment against Omicron to repay the $1,000. *Omicron I*, 21 Wn.2d at 704. Omicron then sued against the broker's bond, which provided that the bond could be used to pay:

> *all damages arising by reason of the failure of the [broker] to render to any person a faithful accounting of all funds so intrusted to him as such real estate broker.*

Omicron I, 21 Wn.2d at 706. The court held that Omicron never had a right to the $1,000 check and, therefore, suffered no damages when it was forced to return the money. *Omicron I*, 21 Wn.2d at 707.

This holding is central to our determination in that a party suffers no damages by being compelled to return money the party wrongfully acquired in the first place. As in *Omicron I*, Jay's estate never owned or legally possessed the converted community asset and therefore parted with nothing of its own in Patricia's lawsuit. The $1.2 million compensatory judgment paid to Patricia was based on the court's calculation of her loss caused by Jay's diversion of profits and ownership interests in GFC. But Jay Goldberg and his trust and estate were never entitled to the wrongfully diverted profits or to an ownership interest in the transferred assets. Jay's estate suffered no loss when the trial court ordered it to return that money. *See Omicron I*, 21 Wn.2d at 709.

Because Jay's estate suffered no damages, its lawsuit must fail as a matter of law. Therefore, the trial court properly granted summary judgment.

II. Attorney Fees

Jay's estate argues that even if it was not damaged when it had to return the money it wrongfully converted, it incurred attorney fees defending Patricia's lawsuit and that these attorney fees constitute damage. We hold that *Omicron II* forecloses this argument.

In *Omicron II*, the court held that because Omicron decided to resist the principal's suit "[w]ith knowledge of all the facts," the money spent on defense was "a risk voluntarily assumed by appellant." *Omicron II*, 23 Wn.2d at 139. Thus, the court determined that the loss was not caused by the broker's actions. *Omnicron II*, 23 Wn.2d at 139. The *Omicron II* court, thus,

based its holding on the theory that there was an intervening cause—Omicron's voluntary decision to try to keep wrongfully obtained money.

The same rationale applies to Jay's estate's decision to spend money resisting Patricia's claim. Jay's estate acted with the full knowledge that Jay had conveyed community property to his separate property account without his wife's consent. Jay's estate argues that this decision was not voluntary because it was required to mitigate damages. But as *Omicron II* held, a party who voluntarily undertakes to defend an action brought to recover property that does not belong to that party may not seek recovery of attorney fees. *Omicron II*, 23 Wn.2d at 139. Given that Jay's estate agreed to pay the full amount of the trial court's damage award, arguing that it had a duty to mitigate damages by denying it wrongfully converted assets is unpersuasive. The decision to resist Patricia's demand for the converted community property was ultimately Jay's estate's own choice, and Prezler's estate cannot be liable for that decision.

We also note that this issue presents Jay's estate with a dilemma. By arguing that its expenditure of over half a million dollars in attorney fees was reasonable, the estate defeats its own negligence claim against Preszler's estate. Because if it was reasonable to resist Patricia's demand and assert that the profit agreement was legitimate and lawful, then there is no basis for claiming that Preszler was negligent. If it took hundreds of thousands of dollars and a 1998 lawsuit to establish that a transaction like the one in this case was invalid, as a matter of law, an accountant cannot be held to have known the transaction was invalid in 1970. A successful argument for attorney fees defeats the negligence claim against Preszler. Thus, regardless of whether we accept that Jay's estate's attorney fee expenditures were reasonable, Preszler's estate

is entitled to summary judgment.

III. Patricia Goldberg's Declaration

Jay's estate next argues that Patricia's declaration creates a genuine issue of material fact about whether, had Preszler or Jay approached her, she would have consented to the transfer and thereby transferred ownership of the converted assets to Jay's separate property. We hold that her declaration is insufficient to create a genuine issue of material fact.

Patricia's declaration that if Preszler or Jay had asked her and explained why, she "in all likelihood . . . would have given my permission in writing to make such a transfer," Clerk's Papers (CP) at 420, is insufficient to create a genuine issue of material fact for purposes of defeating Preszler's motion for summary judgment. Her declaration, made 35 years after the unlawful conversion of community property and after her $1.2 million settlement wherein she was compensated for Jay's conversion of community property, does not concern a fact that existed. In reality, she was not informed and did not consent; that was the basis of her lawsuit. At best, her statement that things may have been different if her husband had chosen to consult her on business matters is speculative.

Moreover, the declaration does not definitively indicate that she would have consented or that her consent would have been effective. Her statement is tempered by the problematic words "in all likelihood." CP at 420. Thus, this is not even a clear statement that she would have consented had Jay or Preszler asked her. And, even if we were to accept Patricia's declaration at face value, it does not establish that Jay or Preszler would have fully informed her and asked for her knowing consent in 1970. We decline to speculate, on the basis of this vague declaration,

about the Goldbergs' family dynamics in the 1970s. We hold that Patricia's declaration is pure supposition and not permitted under CR 56(e) to defeat a motion for summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

We further hold that Patricia's declaration is lacking in "specific facts" required under CR 56(e).[2] The facts to defeat a summary judgment motion must be evidentiary. *Grimwood*, 110 Wn.2d at 359. Mrs. Goldberg does not state on what basis she would have consented—e.g., financial issues, tax issues, probate issues, etc. Essentially, this statement concerns what her state of mind might have been in the 1960s and 1970s and what she might have done if some undisclosed, undetermined information had been given to her. It is simply conclusory and would not be admissible evidence as CR 56(e) requires.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.

[2] "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." CR 56 (e).